Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

PAUL PAPAPANOS,

Petitioner,

v.

LUFTHANSA GERMAN AIRLINES,
etc., et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining whether a defendant is an "agency or instrumentality of a foreign state" for purposes of the federal subject-matter jurisdictional and removal provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 and 1441(d), should a court refer to the defendant's status at the time of the (a) events alleged to give rise to liability or (b) filing of the lawsuit?

PARTIES TO THE PROCEEDINGS

The following were parties to Case No. 96-4755, U.S. Court of Appeals for the Eleventh Circuit:

Cargolux Airlines International, Inc.
Cold Transfer, Inc.
Dial Corp.
Dispatch Services, Inc.
Florida West Gateway, Inc.
Lufthansa German Airlines
Manpower International, Inc.
Miami Express Delivery Services, Inc.
Mr. Paul Papapanos
Regal Air Freight Services, Inc.
Union-Transport Corp.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Paul Papapanos ("Papapanos") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The District Court's March 1, 1995, Order Denying Plaintiff's Motion To Remand (App. 1-9) has not been officially reported, but can be found at 1995 U.S. Dist. LEXIS 9163.

The District Court's June 15, 1995, Order Denying Papapanos' Motion to Amend the March 1, 1995, Order Denying Plaintiff's Motion To Remand to include a statement pursuant to 28 U.S.C. § 1292(b) (App. 10-13) has not been officially reported, but can be found at 1995 U.S. Dist. LEXIS 9159.

The District Court's April 16, 1996, Order Granting Defendants' Motions To Dismiss And/Or For Summary Judgment And Denying Plaintiff's Motion For Leave To File Fourth Amended Complaint (App. 14-59) has not been officially reported, but can be found at 9 Fla. Law Weekly Federal D751 and 1996 U.S. Dist. LEXIS 6433.

Neither the Court of Appeals' August 29, 1997, opinion affirming the District Court's judgment (App. 60-61) nor its October 31, 1997, denial of Papapanos' suggestion for rehearing en banc (App. 62-63) has been reported or published.

STATEMENT OF JURISDICTION

The Court of Appeals' judgment in Case No. 96-4755 was entered on August 29, 1997. On October 31, 1997, the Eleventh Circuit denied Papapanos' suggestion for rehearing en banc.

Section 1254(1), Title 28, U.S. Code, confers jurisdiction on the Court to review on a writ of certiorari the judgment of the Court of Appeals in Case No. 96-4755.

STATUTORY PROVISIONS INVOLVED

Section 1330, Title 28, U.S. Code (Actions against foreign states):

> "(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> "(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.
>
> "(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title."

Section 1441, Title 28, U.S. Code (Actions removable generally):

> "(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
>
> "(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
>
> "(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominate.
>
> "(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the

foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

"(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim."

Section 1603, Title 28, U.S. Code (Definitions):

"For purposes of [Chapter 97, Title 28, U.S. Code, the Foreign Sovereign Immunities Act] –

(a) A 'foreign state', except as used in section 1608 of this title, include a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An 'agency or instrumentality of a foreign state' means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country."

STATEMENT OF THE CASE

On April 18, 1992, Greek customs officials assigned to the Athens International Airport discovered a bag of cocaine, weighing 1,608.9 grams, in a box of carnations which had arrived from Bogota, Colombia, by way of Miami, Florida, and Frankfurt, Germany, aboard a flight operated by Respondent/Defendant Lufthansa German Airlines ("Lufthansa"). Papapanos, the General Manager of the cargo's consignee, Florimex Athens Limited, a subsidiary of Florimex Verwaltungesellschaft MBH, was taken into custody, denied bail and prosecuted by Greek Republic law enforcement authorities for drug trafficking solely because he had ordered the carnations through company channels. He was acquitted by the Greek court on May 28, 1993, and given his freedom.

Prior to September 29, 1994, the German Government owned more than fifty percent (50%) of the stock of Lufthansa, a German corporation, thereby constituting Lufthansa an "agency or instrumentality of a foreign state" under the Foreign Sovereign Immunities Act ("the FSIA"). On September 29, 1994, a $600,000,000.00 public offering of Lufthansa's stock brought the German Government's ownership share below fifty percent (50%), as a consequence of which Lufthansa lost its status as an

"agency or instrumentality of a foreign state" under the FSIA.

Papapanos, on November 15, 1994, filed a negligence suit in the Eleventh Circuit Court of Florida ("the Florida State Court") against Lufthansa and others. The Florida state court assigned that action Case No. 94-21258 (CA 02).

Lufthansa removed Case No. 94-21258 (CA 02) to the U.S. District Court, Southern District of Florida ("the Federal District Court"), on December 15, 1994, citing 28 U.S.C. § 1441(d) (claiming that it was entitled to be treated as an "agency or instrumentality" of the German Government) and 28 U.S.C. § 1441(b) (claiming that the action arose under the Warsaw Convention). None of the other defendants joined in that petition. The Federal District Court assigned Case No. 94-2667-Civ-Marcus ("Case No. 94-2667") to the removed lawsuit.

Noting that Lufthansa had been privatized on September 29, 1994, and contending that the Warsaw Convention was inapplicable, Papapanos moved on December 27, 1994, to remand Case No. 94-2667 to the Florida State Court pursuant to 28 U.S.C. § 1447(c). The Federal District Court on March 1, 1995, denied that motion on the sole ground that Lufthansa, having allegedly acted tortiously prior to its privatization, had been entitled to remove Case No. 94-21258 (CA 02) pursuant to 28 U.S.C. § 1441(d). (App. 1-9)

On March 6, 1995, Papapanos moved to amend the Federal District Court's March 1, 1995, order to include the statement required by 28 U.S.C. § 1292(b) to facilitate

an interlocutory appeal. The Federal District Court denied that motion on June 15, 1995. (App. 10-13)

The Federal District Court, on April 16, 1996, entered an order granting the defendants' motions to dismiss and for summary judgment and denying Papapanos' motion for leave to file a proposed Fourth Amended Complaint. (App. 14-59) In that order, the Federal District Court concluded that, under Florida's substantive law, the defendants had not owed Papapanos a duty to use reasonable care to prevent the shipment of carnations from arriving in Athens, Greece, with cocaine hidden in one of its constituent boxes.

On May 17, 1996, the Federal District Court entered a final judgment adverse to Papapanos. Papapanos' notice of appeal was filed on May 28, 1996.

The Court of Appeals, *per curiam*, on August 29, 1997, issued the following opinion in Case No. 96-4755:

> "We affirm the district court's decision rejecting appellant's claims on the merits. We adopt as our own the reasoning of its dispositive order of April 15, 1996, granting appellees' motions to dismiss and/or summary judgment and denying appellant leave to file a fourth amended complaint.
>
> "We reject for the reasons stated in Point I of Lufthansa's brief appellant's argument that the district court lacked subject matter jurisdiction because Lufthansa was not entitled to remove the case to federal court under 28 U.S.C. § 1441(d)."

(App. 60-61)

Papapanos, on September 17, 1997, filed and served his Suggestion Of Rehearing En Banc, which was denied on October 31, 1997. (App. 62-63)

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF TWO OTHER UNITED STATES COURTS OF APPEALS CONCERNING THE BENCHMARK DATE FOR DETERMINING A DEFENDANT'S STATUS AS AN "AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE" UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

In addition to the Eleventh Circuit in this case, two (2) United States Courts of Appeals have held that, in determining whether an entity is a "foreign state" under the FSIA, a court is to look to the status of the defendant at the time of the events alleged to give rise to liability. *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988), *cert. dismissed sub. nom. Pechiney & Trefimetaux v. Gould, Inc.*, 503 U.S. 978 (1992); and *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376, 1380-1382 (8th Cir. 1993).

However, two (2) other United States Courts of Appeals and a U.S. District Court have ruled that, in determining whether an entity is a "foreign state" under the FSIA, a court is to look to the status of the defendant either at the time when suit was brought or trial began. *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458, 1460

(9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1106-1107 (5th Cir. 1985); *Straub v. A.P. Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994); and *Morgan Guaranty Trust Co. v. Republic of Palau*, 639 F. Supp. 706, 712 (S.D.N.Y. 1986), *vacated on other grounds*, 924 F.2d 1237, 1245 (2nd Cir. 1991) (action remanded to New York State Court).

The foregoing conflict among the United States Courts of Appeals was recognized, but not resolved, by the Court in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989). *See, also, Cargill International, S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1015-1016 (2nd Cir. 1993) (noting the conflict, but not deciding the issue).

MOORE'S FEDERAL PRACTICE (Third Edition) observes:

> **"Time of Determination**
>
> "One question that has not been fully resolved is whether, in determining whether an entity is a 'foreign state' under the FSIA, a court is to consider the defendant at the time of the events alleged to give rise to liability or at the time when suit was brought. For example, an entity might have been a private corporation at time A, but was then nationalized by time B. One view is that the FSIA applies if the party meets the definition of a foreign state at the time when the lawsuit is filed, even if that party was not a foreign state at the time of the alleged wrongdoing. However, others have reached the opposite conclusion, looking instead to the situation as it existed when the acts giving rise to the cause of action occurred." (Footnotes omitted)

MOORE'S FEDERAL PRACTICE (Third Edition), Volume 15, § 104.11[4], p. 104-27.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE IN THE ADMINISTRATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

In 1976, when it enacted the FSIA, Congress could not have foreseen the tidal wave of privatization of state-owned industries which, since the end of the Cold War, has swept across Europe, Asia and Latin America. Consequently, neither the language nor the legislative history of the FSIA answers the important question squarely presented in this case: is a foreign corporation, when sued post-privatization in State Court for pre-privatization conduct, entitled to remove the civil action to Federal Court by invoking 28 U.S.C. §§ 1330 and 1441(d)?

The grant of Papapanos' petition would enable the Court to reconcile federal subject-matter jurisdiction and removal under 28 U.S.C. §§ 1330 and 1441(d) with the world-wide privatization phenomenon.

CONCLUSION

Papapanos' Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (Case No. 96-4755) should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 94-2667-CIV-MARCUS

PAUL PAPAPANOS,

Plaintiff,

v.

LUFTHANSA GERMAN AIRLINES, etc., et al.,

Defendants.
_____/

ORDER DENYING PLAINTIFF'S MOTION TO REMAND

(Filed Mar. 1, 1995)

THIS CAUSE comes before the Court upon the Plaintiff's motion to remand, filed December 27, 1994. The Plaintiff asserts that the action was improperly removed and that the case should be remanded to the Florida court from which it was removed. For the reasons stated below, the Plaintiff's motion to remand must be and is hereby DENIED.

This action was originally filed in the Circuit Court of the Eleventh Judicial Circuit of Florida, Dade County, on November 16, 1994. On December 15, 1994, Defendant Lufthansa German Airlines ("Lufthansa") filed a notice of removal, citing two bases for removal of the action. First, Lufthansa contends that it may remove the action as a "foreign state," as defined in 28 U.S.C. § 1603, and 28

U.S.C. § 1441(d).[1] Notice of Removal ¶¶ 2-4. In addition, Lufthansa states that the action is governed by the Warsaw Convention. *Id.* ¶ 5. The Plaintiff has moved to remand the action, claiming that neither basis for removal is proper. Because we find that the Foreign Sovereign

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[1] Section 1441(d) states:

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

18 U.S.C. § 1441(d). Section 1603 states, in relevant part:

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as denied in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity–
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.28 U.S.C. § 1603(a)-(b).

Immunities Act is a proper basis for removal of the present case, we need not address the parties, arguments regarding the Warsaw Convention.

The Plaintiff does not contest Lufthansa's statement that it was a "foreign state" within the meaning of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603, at the time the cause of action in this case arose. Instead, Plaintiff notes that Lufthansa has since become a private entity, through a public offering of its stock, and that the privatization occurred prior to the filing of this case on November 15, 1994.[2] According to Papapanos, this change in status deprives Lufthansa of the right to remove this action to federal court under the FSIA. Mot. Remand at 4-8. Lufthansa counters that despite the change in status, the fact that it was a foreign state for purposes of the FSIA at the time the cause of action arose is sufficient for removal of the action pursuant to the FSIA. Def. Lufthansa's Mem. Law Opp. Pltff.'s Mot. Remand at 1-5.

While no court has decided this precise issue, two Circuit Courts of Appeal have addressed the applicability of the FSIA's immunity provisions, rather than the removal statute, where the entity claiming immunity lost its "foreign state" status after the cause of action arose but before the filing of the complaint. In *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993), the plaintiffs asserted claims against Air Canada, as well as

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[2] Lufthansa admits that it has lost foreign state status in both its notice of removal and its response to the Plaintiff's motion. Notice of Removal ¶ 4; Def. Lufthansa's Mem. Law Opp. Pltff.'s Mot. Remand at 2.

numerous other defendants, arguing that the defendants "conspired to suppress information about [a corporation's] financial status in order to dupe [one plaintiff] into buying [the corporation] at an inflated price." *Id.* at 1379. Air Canada moved to dismiss the claims against it on the grounds that, at the time of the alleged wrongdoing, Air Canada was a "foreign state" within the meaning of the FSIA and was, therefore, immune from suit. The District Court granted the motion to dismiss, and the plaintiffs appealed. On appeal, the plaintiffs argued, among other grounds for reversal, that the FSIA did not apply because Air Canada was no longer owned by the Canadian government at the time the suit was brought. The Eighth Circuit affirmed, holding that FSIA immunity applies to an entity which qualified as a foreign state under section 1603 at the time the cause of action arose despite having lost that status before the lawsuit was initiated. In coming to that conclusion, the Court stated:

> The doctrine of foreign state sovereign immunity was "created to effectuate general notions of comity among nations." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762, 92 S.Ct. 1808, 1811, 32 L.Ed.2d 466 (1972); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 1967, 76 L.Ed.2d 81 (1983) ("sovereign immunity is a matter of grace and comity on the part of the United States"). The foreign policy concerns discouraging us from judging the acts of another nation are not necessarily eliminated because an entity is not a foreign state at the time of suit. *See First Nat'l City Bank*, 406 U.S. at 761-62, 92 S.Ct. at 1810.

991 F.2d at 1381. The Eighth Circuit also noted that the only other Circuit to have addressed the issue had also found FSIA immunity where the party asserting immunity had lost its "foreign state" status between the time of the alleged wrongdoing and the commencement of the lawsuit. *Id.* at 1380-81 (citing *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1987)).[3] Therefore, the Court held that immunity under the FSIA would be preserved despite the change in status.

In *Gould*, the defendants fell within the FSIA definition of "foreign state" at the time the acts complained of occurred, but during the pendency of the appeal of the District Court's rulings regarding the "commercial activity" exceptions to FSIA immunity, one of the defendant corporation's shares were sold to a privately owned company. On appeal, the plaintiff argued that this change in

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[3] In both *General Electric* and *Gould*, the Courts cited to a 1922 Supreme Court case, *The Western Maid*, 257 U.S. 419 (1922). In that case, a ship owned by the United States was involved in a collision while performing transportation duties for the United States War Department. The vessel was then transferred to a private party, and a suit was brought seeking to attach liability to the ship. The Supreme Court held that the sovereign immunity which applied at the time of the collision was not later lost by the vessel's transfer into private hands. The Court reasoned that the doctrine of sovereign immunity declares that the sovereign's acts cannot be legally wrong, and, therefore, although the private owner was not entitled to sovereign immunity, there was no tort upon which to sue. *Id.* at 432-33. Therefore, the District Court's denial of the motion to dismiss was reversed.

ownership eliminated FSIA immunity as to that defendant. The Sixth Circuit disagreed, stating, in full, with respect to this issue:

> The subject matter jurisdiction granted to the district courts by the FSIA in 28 U.S.C. § 1330(a) is neither diversity nor alienage jurisdiction, but federal question jurisdiction. It is a statutory grant of jurisdiction enacted by Congress pursuant to the "arising under" clause of Article III, Section 2, of the Constitution. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). When subject matter jurisdiction is predicated upon the diversity of the parties, citizenship is determined at the time the action is commenced. *E.g., Anderson v. Watts*, 138 U.S. 694, 702-03, 11 S.Ct. 449, 451, 34 L.Ed. 1078 (1891). It would appear that the determination of whether a party is subject to the court's jurisdiction under 28 U.S.C. § 1330 should be based upon a party's status at the time the act complained of occurred. *See Morgan Guar. Trust Co. of N.Y. v. Republic of Palau*, 639 F.Supp. 706, 712 (S.D.N.Y. 1986) (rejecting date of complaint as time to determine status of defendant for purpose of defining "foreign state"). *Cf. The Western Maid*, 257 U.S. 419, 42 S.Ct. 159, 66 L.Ed. 299 (1922) (liability did not attach for acts occurring while ship was owned by federal government after ownership transferred to private hands).

853 F.2d at 450 (footnote omitted). Accordingly, the change in ownership did not affect the defendant's FSIA immunity.[4]

This same analysis applies where the issue is removal pursuant to the FSIA rather than sovereign immunity under that act. Section 1441(d) is part of the FSIA, "which represented a comprehensive effort 'to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to immunity.' " *Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1531 (11th Cir. 1985) (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess, *reprinted in*, 1976 U.S.C.C.A.N. 6604, 6604. The statute has been read broadly in order to effectuate its purposes. *See, e.g. In re Surinam Airways Holding Co.*, 974 F.2d 1255 (11th Cir. 1992) (holding that removal under section 1441(d) by a third-party defendant foreign state removes the entire case rather than just the third-party claims). In addition, the FSIA requires a trial by the court without a jury. 28 U.S.C. § 1441(d). Disallowing removal where the defendant has lost its foreign state status prior to the filing of the lawsuit but notably after the cause of action arose would likely result in the foreign sovereign's actions – at the time the cause of action arose – being reviewed by a jury. This result would be contrary to

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[4] The Sixth Circuit went on to reverse the District Court's procedure in ruling regarding the commercial activity exceptions to FSIA immunity and remanded the matter for a determination under the appropriate standard. Therefore, the party's FSIA immunity had not been finally determined for purposes of the lawsuit at the time the Sixth Circuit's ruling was made.

Congress's intent in the FSIA of " 'render[ing] uniform in procedure and substance the treatment of foreign sovereigns subjected to suit in American courts.' " *In re Surinam Airways Holding Co.*, 974 F.2d at 1259 (quoting *Nolan v. Boeing Co.*, 919 F.2d 1058, 1065 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1587 (1991)). The lawsuit is premised on the facts and circumstances which existed at the time the cause of action arose – when the entity had foreign state status. The fact that the entity is not a foreign state at the time the suit is brought does not negate the foreign policy implications of the lawsuit, and the corresponding comity considerations, because the court will necessarily evaluate the foreign state's actions at the time the cause of action arose. Thus, the rationale behind the FSIA is still applicable despite the entity's loss of foreign state status.

In support of his argument, Plaintiff cites to two District Court cases which held that foreign state status at the time the suit was brought will suffice for purposes of FSIA removal – *Balentine v. Union Mortgage Co.*, 795 F. Supp. 266 (N.D. Ill. 1992), and *Murray v. Union Mortgage Co.*, 1992 WL 247409, No. 91-0799-RV-M (S.D. Ala. 1992). In each of these cases, the defendant took on foreign state status *after* the cause of action arose, but *before* the entity sought removal to federal court. In each case, the District Court held that the status as a foreign state at the time of removal was sufficient. In doing so, each of these courts implicitly rejected the argument that the defendant was not entitled to remove the action because it was not a foreign state when the cause of action arose. *See Balentine*, 795 F. Supp. at n.4. However, neither case held that foreign state status at the time the cause of action arose

would not also be sufficient for FSIA removal. Removal here is not undermined by the cases cited by Plaintiff. Moreover, the purposes of the FSIA are best served if an entity which is a foreign state at the time the cause of action arose is permitted to remove the case to federal court even though it is no longer a foreign state at the time the lawsuit is commenced or when removal is sought. Therefore, Lufthansa is entitled to remove this case pursuant to the FSIA, 28 U.S.C. § 1441(d).

Accordingly, it is hereby

ORDERED and ADJUDGED that the Plaintiff's motion for remand is DENIED.

DONE AND ORDERED in Miami, this 1st day of March, 1995.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES
DISTRICT JUDGE

cc: Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 94-2667-CIV-MARCUS

PAUL PAPAPANOS,

Plaintiff,

v.

LUFTHANSA GERMAN AIRLINES, etc., et al.,

Defendants.
_____/

ORDER

(Filed June 15, 1995)

THIS CAUSE comes before the Court upon the Plaintiff's motion to amend Order Denying Plaintiff's Motion to Remand to include a statement pursuant to 28 U.S.C. § 1292(b) (DE #56), filed March 6, 1995. Upon a thorough review of the pleadings, and for the reasons stated below, the Plaintiff's motion must be and is hereby DENIED.

This action was removed from the Circuit Court in and for the Eleventh Judicial Circuit of Florida on December 15, 1995. In its removal petition, Defendant Lufthansa German Airlines ("Lufthansa") stated that it was a "foreign state" within the meaning of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603.[1] On December 27, 1995, the Plaintiff moved to remand the action, arguing that although Lufthansa was a "foreign state" within

[1] Lufthansa also claimed that the action is governed by the Warsaw Convention. Because this Court resolved the motion to remand solely on the grounds of the FSIA, the Warsaw Convention, is not at issue in the present motion.

the meaning of the FSIA at the time this cause of action accrued, it has since lost that status. The Plaintiff asserted that with the change in status, Lufthansa was not entitled to removal pursuant to 28 U.S.C. § 1441(d).[2] On March 1, 1995, this Court denied the Plaintiff's motion to remand, stating

> Disallowing removal where the defendant has lost its foreign state status prior to the filing of the lawsuit but notably after the cause of action arose would likely result in the foreign sovereign's actions – at the time the cause of action arose – being reviewed by a jury. This result would be contrary to Congress's intent in the FSIA of " 'render[ing] uniform in procedure and substance the treatment of foreign sovereigns subjected to suit in American courts.' " *In re Surinam Airways Holding Co.*, 974 F.2d [1255,] 1259 [(11th Cir. 1992)] (quoting *Nolan v. Boeing Co.*, 919 F.2d 1058, 1065 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1587 (1991)). This lawsuit is premised on the facts and circumstances which existed at the time the cause of action arose – when the entity had foreign state status. The fact that the entity is not a foreign state at the time the suit is brought does not negate the foreign policy implications of the lawsuit, and the corresponding comity considerations, because the court will necessarily evaluate the foreign state's actions at the time the

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[2] Section 1441(d) states, in relevant part:

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending.

> cause of action arose. Thus, the rationale behind the FSIA is still applicable despite the entity's loss of foreign state status.

Order Denying Plaintiff's Motion to Remand, dated March 1, 1995, at 7. The Plaintiff now seeks amendment to that Order to permit interlocutory appeal of the March 1, 1995, ruling.

Section 1292(b) of Title 28 states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). Accordingly, three criteria must be met for certification to be appropriate: (1) the decision is regarding a controlling issue of law; (2) there are substantial grounds for difference of opinion; and (3) appeal may materially advance the ultimate termination of the litigation. *Id.*

The first and third conditions for interlocutory appeal appear to be present in this case because if the Defendant lacked power to remove the action, then this Court would be deprived of jurisdiction over the action. However, the second prong of this test has not been met in this case. The Plaintiff's entire argument in his motion is essentially that because his motion for remand implicates this Court's jurisdiction, he should be permitted immediate appeal. Plaintiff has failed to cite a single case

from any court holding contrary to this Court's decision, and we can find no basis upon which substantial grounds for difference of opinion could be asserted. This Court's opinion was firmly rooted in both binding and persuasive authority. Accordingly, it is hereby

ORDERED and ADJUDGED that the Plaintiff's motion to amend order denying Plaintiff's motion to remand to include a statement pursuant to 28 U.S.C. § 1292(b) is DENIED.

DONE AND ORDERED in Miami, this 15th day of June, 1995.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES
DISTRICT JUDGE

copies to:
United States Magistrate Judge Stephen T. Brown
counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 94-2667-CIV-MARCUS

PAUL PAPAPANOS,

Plaintiff,

v.

LUFTHANSA GERMAN AIRLINES, etc., et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND/OR FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT
(Filed April 16, 1996)

_____/

THIS CAUSE comes before the Court upon the following motions: (1) Defendant Dispatch Services' Motion for Summary Judgment, filed February 1, 1995; (2) Defendant Union Transport's Motion to Dismiss, filed February 17, 1995; (3) Defendant Cold Transfer's Motion to Dismiss, filed February 21, 1995; (4) Defendant Miami Express's Motion to Dismiss Amended Complaint, filed March 24, 1995; (5) Defendant Regal Air Freight's Motion to Dismiss Amended Complaint, filed March 27, 1995; (6) Defendants Lufthansa and Cargolux's Cross-Motion for Partial Summary Judgment on Plaintiff's Claims for Negligence, filed April 24, 1995; (7) Defendant Florida West Gateway's Motion for Summary Judgment, filed April 26, 1995; (8) Plaintiff's Motion for Leave to File Fourth Amended Complaint, filed October 10, 1995; (9) Defendant Manpower's Motion to Dismiss, filed October 23,

1995; and (10) Defendant Lufthansa's Motion for Partial Summary Judgment Dismissing Plaintiff's Claim for Intentional Infliction of Emotional Distress, filed October 31, 1995. After a thorough review of the record and pleadings, and having considered the arguments of counsel, Dispatch Services' Motion for Summary Judgment must be and is GRANTED. Union Transport's Motion to Dismiss is GRANTED. Cold Transfer's Motion to Dismiss is GRANTED. Miami Express's Motion to Dismiss Amended Complaint is GRANTED. Regal Air Freight's Motion to Dismiss Amended Complaint is GRANTED. Lufthansa and Cargolux's Cross-Motion for Partial Summary Judgment on the Plaintiff's Claims for Negligence is GRANTED. Florida West Gateway's Motion for Summary Judgment is GRANTED. Manpower's Motion to Dismiss is GRANTED. Lufthansa's Motion for Partial Summary Judgment Dismissing Plaintiff's Claim for Intentional Infliction of Emotional Distress is GRANTED. The Plaintiff's Motion for Leave to File a Fourth Amended Complaint is DENIED.

I.

This action arises out of the Plaintiff's shipment of carnations from Colombia to Greece in time for the Greek Orthodox Easter in 1992. Paul Papapanos, a Greek national and director and manager of Florimex Athens, a subsidiary of a German corporation known as Florimex, ordered the carnations from a Florimex affiliate in Bogota. The affiliate arranged for the transportation of the flowers to Athens. On or about April 16, 1992, boxes constituting the sixth of a planned seven shipments of

carnations were delivered to Bogota airport by Colombian growers. Colombian packers consolidated the boxes into a single shipment, which was inspected by Colombian customs officials. The flowers were then flown from Bogota to Miami International Airport in Miami, Florida, and then to Athens via Frankfurt, Germany. When the shipment arrived in Athens, however, Greek customs agents discovered cocaine in one of the boxes constituting the sixth shipment. The Greek authorities subsequently arrested the Plaintiff and charged him with the illegal importation of drugs, on the basis of his position as managing director of the business that had ordered the flowers. Papapanos was imprisoned from April 22, 1992 until his acquittal on the criminal charge on May 28, 1993. Florimex Athens ceased operations in July of 1994.

The Plaintiff filed his initial complaint in the Fall of 1994 in a Florida state court, and thereafter, on December 15, 1994, the Defendants filed a notice of removal.[1] The Plaintiff filed his first amended complaint on January 18, 1995. On September 21, 1995 the Court *ore tenus* granted the Plaintiff's application for leave to file a third amended complaint. In Count I of his third amended complaint, Papapanos asserts that the Defendants – various private airlines and cargo handlers – were negligent in failing to (1) provide adequate procedures to prevent

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[1] In an Order dated March 1, 1995, this Court denied the Plaintiff's motion for remand. On June 15, 1995, the Court also denied the Plaintiff's motion to amend the denial of remand to include a certification for interlocutory appeal under 28 U.S.C. § 1292(b).

drugs from being interposed with the shipment, (2) adequately inspect the boxes and detect any holes or extraneous markings and (3) x-ray the boxes. Plaintiff further contends that his subsequent misfortunes were the proximate result of this negligence. He seeks damages in excess of $15,000. In Count II of the complaint, Papapanos alleges that Defendant Lufthansa is liable for intentional infliction of emotional distress due to its unwillingness to provide him with a letter that might have secured his release from the Greek jail. The Plaintiff seeks punitive damages against Lufthansa in Count II.

II.

All of the Defendants have filed motions to dismiss the Plaintiff's complaint and/or for summary judgment against Papapanos. The Defendants insist that Papapanos has failed to allege or introduce facts to support his claim that the Defendants owed him a duty to detect or remove the cocaine from the boxes of carnations while en route from Bogota to Athens. In addition, Lufthansa contends that its failure to deliver the letter to Papapanos does not represent the kind of unjustifiable, outrageous conduct needed to obtain relief under Florida law for intentional infliction of emotional distress. The Plaintiff, for his part, has filed a motion for leave to amend his complaint a fourth time. The Court took argument on the pending motions at the pre-trial conference on December 21, 1995.

A.

The purpose of a Rule 12(b) (6) motion is to test the facial sufficiency of the statement of claim for relief. It is

read along with Rule 8(a) of the Federal Rules of Civil Procedure, which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." The motion is not designed to strike inartistic pleadings or to provide a more definite statement to answer an apparent ambiguity, and the analysis of a 12(b)(6) motion is limited primarily to the face of the complaint and attachments thereto. *See* 5 Charles A. Wright & Arthur Miller, *Federal Practice and Procedure* § 1356 at 590-92 (1969)(Wright & Miller). Moreover, for the purposes of the motion to dismiss, the complaint must be construed in a light most favorable to the plaintiff and the factual allegations taken as true. *See SEC v. ESM Group, Inc.*, 835 F.2d 270, 272 (11th Cir.), *reh'g denied*, 840 F.2d 25, *cert. denied*, 486 U.S. 1055 (1988).

According to the Eleventh Circuit:

> [T]he Supreme Court has stated that the "accepted rule" for appraising the sufficiency of a complaint is "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 4546, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Tiftarea Shopper, Inc. v. Georgia Shopper, Inc.*, 786 F.2d 1115, 1117-18 (11th Cir. 1986) (quoting *Conley*).

Id. A complaint may not be dismissed because the plaintiff's claims fail to support the legal theory he relies upon since the court must determine if the allegations provide for relief on *any* possible theory. *Robertson v. Johnston*, 376

F.2d 43 (5th Cir. 1967).[2] We hasten to add that this motion is viewed with disfavor and rarely granted. *See e.g., Madison v. Purdy*, 410 F.2d 99, 100 (5th. Cir. 1969); *International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Service*, 400 F.2d 465, 471 (5th Cir. 1968) (noting that "[d]ismissal of a claim on the basis of barebone pleadings is a precarious disposition with a high mortality rate."). The pleadings must show, in short, that the Plaintiff has no claim before the 12(b)(6) motion may be granted. It is against this standard that we consider the pending motions to dismiss.

The standard to be applied in reviewing the outstanding summary judgment motions is stated unambiguously in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

It may be entered only where there is *no* genuine issue of material fact. Moreover, the moving party has the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

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[2] In *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

In applying this standard, the Eleventh Circuit has explained:

> In assessing whether the movant has met this burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *Adickes*, 398 U.S. at 157, 90 S. Ct. at 1608; *Marsh*, 651 F.2d at 991. All reasonable doubts about the facts should be resolved in favor of the non-movant. *Casey Enterprises v. Am. Hardware Mutual Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. *Marsh*, 651 F.2d at 991; *Lighting Fixture & Elect. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co.*, 420 F.2d at 1213. If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. *Impossible Electronics*, 669 F.2d at 1031; *Croley v. Matson Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970).
>
> Moreover, the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. at 160, 90 S.Ct. at 1609-10; *Marsh*, 651 F.2d at 991. The moving party must demonstrate that the facts underlying all the relevant

> legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir. 1967). *See Dalke v. Upjohn Co.*, 555 F.2d 245, 248-49 (9th Cir. 1977).

Clemons v. Dougherty County, 684 F.2d 1365, 1368-69 (11th Cir. 1982); *see also Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986).

The United States Supreme Court has provided significant additional guidance as to the evidentiary standard which trial courts should apply in ruling on a motion for summary judgment:

> [The summary judgment] standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80, 64 S. Ct. 232, 234, 88 L. Ed. 239 (1943).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Court in *Anderson* further stated that "[t]he mere existence of a scintilla of evidence in support of the position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Id.* at 252. In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. *Id.* at 254. If the non-movant in a

summary judgment action fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted. *Id.* at 254-55.

In another recent case, the Supreme Court has declared that a non-moving party's failure to prove an essential element of a claim renders all factual disputes as to that claim immaterial and requires the granting of summary judgment:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will *bear* the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (emphasis added). We measure the motions for summary judgment against these standards.

We first address Defendant Manpower's motion to dismiss the third amended complaint.[3] This motion provides the vehicle for most of the Plaintiff's arguments concerning the existence of the duties that, he contends, were owed to him by the cargo handlers and carriers who came in contact with the sixth shipment of carnations.

Manpower has moved to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b) (6). Manpower is a Delaware corporation that provides certain cargo handling services. According to the complaint, Manpower and Lufthansa had executed a contract that required Manpower to provide cargo handling personnel to Lufthansa at Lufthansa's cargo warehouse at Miami International Airport ("MIA"). The Plaintiff alleges that the shipment later found to contain cocaine remained at Lufthansa's storage facility for 2½ hours on April 16, 1992, during which time Manpower employees "arranged" the boxes constituting the shipment on a pallet covered by an open net, in preparation for loading the cargo onto a Lufthansa aircraft. The Plaintiff insists that Manpower (along with the other Defendants) "owed to Papapanos a duty to use a high degree of care to prevent

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[3] Manpower has filed a motion to strike the Plaintiff's memorandum of law in opposition to its motion to dismiss. As grounds for this motion, Manpower points out that the memorandum of law, filed October 30, 1995, is thirty (30) pages in length. Under S.D. Fla. L.R. 7.1(c)(2), memoranda of law are not to exceed twenty (20) pages without leave of court. The Plaintiff counters that he was unable to address the contentions in Manpower's motion without exceeding the page limit of Local Rule 7.1. In the interest of resolving this case on the merits, we will consider the arguments raised in Papapanos' response and deny the motion to strike.

the [shipment] from arriving in Athens, Greece with illegal drugs, including cocaine." The Plaintiff maintains that Manpower breached its duty of care by failing to detect or remove the cocaine. *See* Third Amended Complaint, at ¶¶ 30-31.

Manpower raises several arguments in support of its motion to dismiss. First, it asserts that the Plaintiff has failed to allege that the shipment contained cocaine at the time the boxes were in the possession of Manpower employees. Second, it argues that the Plaintiff has failed to allege the elements of negligence under Florida law. Third, it maintains that the Plaintiff's cause of action is barred by the Warsaw Convention's two year statute of limitations. The instant motion can be resolved on the threshold question of whether Manpower owed Papapanos a duty to detect or remove the cocaine while the shipment was under its control at Lufthansa's cargo warehouse.

To state a cause of action for negligence under Florida law, the plaintiff first must establish that the defendant owed him a legal duty of care. *Coker v. Wal-Mart Stores*, 642 So. 2d 774, 776 (Fla. 1st Dist. Ct. App. 1994), *rev. denied*, 651 So. 2d 1197 (Fla. 1995). In *McCain v. Florida Power Corp.*, 593 So. 2d 500, 503 n.2 (Fla. 1992), the Florida Supreme Court recognized that a legal duty can arise from several sources, including the relationship of the parties, legislative enactments or the general facts of the case.[4] The existence of a duty is a question of law to be

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[4] Papapanos does not allege that Manpower or any of the other Defendants had a contractual or other "special

decided by the court, rather than question of fact to be reserved for a jury. *Id.* at 502; *see also Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110, 1114 (11th Cir. 1992) (Georgia law), *cert. denied*, 506 U.S. 1071 (1993).

Papapanos alleges that federal statutes regulating the import and export of controlled substances created a duty on the part of Manpower to detect or remove the cocaine during the 2½ hours that the shipment was under its control at the Lufthansa warehouse. Nothing in the text or legislative history of these statutes can be read to evince a Congressional intent to create a private civil cause of action based on a defendant's unwitting facilitation of a drug trafficking offense. Florida courts have acknowledged, however, that, under certain facts and circumstances, a statute can impose a common law duty where the statute requires someone in the position of the defendant to take precautions to protect a particular class of persons from a particular injury or type of injury. *Rex Utilities, Inc. v. Gaddy*, 413 So. 2d 1232, 1233 (Fla. 3d Dist. Ct. App. 1982) (citing *DeJesus v. Seaboard Coast Line R.R. Co.*, 281 So. 2d 198, 201 (Fla. 1973)), *rev. denied*, 422 So. 2d 843 (Fla. 1983); *see also Palmer v. Shearson Lehman Hutton, Inc.*, 622 So. 2d 1085, 1090 (Fla. 1st Dist. Ct. App. 1993); *Brooks v. Southern Bell Tel. & Tele. Co.*, 399 So. 2d 1, 3 (Fla. 4th Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 463 (Fla. 1982).

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relationship" with him, such that they had a duty to control or warn of tortious or criminal conduct by third parties that might have placed the Plaintiff in danger. *See Palmer*, 622 So. 2d at 1089.

The Plaintiff insists that he is in the class of persons that Congress intended to protect when it passed various laws proscribing the international trafficking of illegal drugs. To be specific, the Plaintiff pinpoints 21 U.S.C. §§ 891 and 951-955. Section 951, in pertinent part, defines the terms "import" and "customs territory." Section 952 proscribes the importation of narcotics and controlled substances in these terms:

> It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV or V of subchapter I of this chapter. . . . "

21 U.S.C. § 952(a). Section 953 provides in pertinent part that "[i]t shall be unlawful to export from the United States any narcotic drug in schedule I, II, III, or IV." Section 954 provides in pertinent part that:

> Notwithstanding sections 952, 953 and 957 of this title –
>
> (1) A controlled substance in schedule I may
>
> (A) be imported into the United States for transshipment to another country, or
>
> (B) be transferred or transshipped from one vessel, vehicle or aircraft to another vessel, vehicle or aircraft within the United States for immediate exportation,
>
> if and only if it is so imported, transferred or transhipped (I) for scientific, medical or other

> legitimate purposes in the country of destination, and (ii) with the prior written approval of the Attorney General. . . .

Id. at § 954(1). Section 955 provides:

> It shall be unlawful for any person to bring or possess on board any vessel or aircraft, or on board any vehicle or carrier, arriving in or departing from the United States or the customs territory of the United States, a controlled substance in schedule I or II or a narcotic drug in schedule III or IV, unless such substance or drug is a part of the cargo entered in the manifest or part of the official supplies of the vessel, aircraft or vehicle.

Id. at § 955. Finally, section 881 allows for forfeiture of "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession or concealment of [certain controlled substances or raw materials]." *Id.* at § 881(a)(4).

Papapanos never identifies quite how these statutes create the duties that he seeks to impose on Manpower. Indeed, he is unable to cite a single case for the proposition that these general laws outlawing the importation and exportation of narcotics and controlled substances can be construed to create or support a private civil cause of action for common law negligence. He nevertheless maintains that "Papapanos, as a citizen of Greece and the Managing Director of Florimex Athens, Ltd., was a member of the class of persons which Congress sought to protect from the dangers and evils of narcotics when it enacted 21 U.S.C. §§ 891 and 951-955." P'tiff. Resp., at 16. In the most generous sense, of course, the Plaintiff is

correct. When Congress enacted laws criminalizing the import and export of illegal drugs, it did so in order to protect the public at large from the harmful and destructive effects of the use and trafficking of controlled substances. It does *not* follow, however, that the Florida courts would construe national legislative enactments to create an affirmative, common law obligation on the part of Manpower or other air cargo handlers or carriers to ferret out illegal drugs contained in the cargo that passes through their control.

For a statute to give rise to a common law duty, the codification in question must be one that clearly and unmistakably proscribes certain discrete acts by an expressly identified person or class of persons in order to regulate a specific, foreseeable type of injury. When a statutory framework is directed toward a narrow class of persons and imposes sharp strictures on the conduct of those persons, it may form the basis for a common law cause of action against a member of the class of persons being regulated. By contrast, when the statute sweeps more broadly, and prohibits a variety of conduct by a variety of persons, the foundation for a common law duty is more tenuous.

The cases that Papapanos cites in support of his position illustrate the marked difference between the narcotics statutes that he references in his Response and more targeted regulations that can give rise to common law obligations. In *Decker v. Gibson Prods. Co.*, 679 F. 2d 212 (11th Cir. 1982), for example, the children and mother of a shooting victim brought a negligence action against a gun seller. The plaintiffs alleged that the weapon used in

the incident had been sold to the shooter by the defendant in violation of 18 U.S.C. § 922(d) (1), which provides in pertinent part:

> (d) It shall be unlawful for any licensed manufacturer, licensed dealer or licensed collector to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person –
>
> > (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.

679 F.2d at 214 n.2. On the basis of this statute, the plaintiffs argued that the defendant, a licensed firearms dealer, owed them a common law duty to refrain from knowingly selling firearms to the shooter. The district court granted summary judgment in favor of the defendant, finding that the statute did not create an implied private right of action. On appeal, however, the Eleventh Circuit reversed and remanded. The Court of Appeals concluded that the district court overlooked the plaintiffs' argument that they sought relief on a theory of negligence, rather than directly under the statute. Judge Roney, writing for the panel, explained that "[t]o determine whether the statute is an appropriate standard of due care, courts examine the purpose of the statute to ascertain the harm it was intended to guard against and the persons it was intended to protect." *Id.* at 214. Applying this standard, the court acknowledged that, under Georgia law, section 922(d)(l) could give rise to a common law duty of care. *Id.* at 215. Subsequent courts have agreed with *Decker's analysis of the common law implications*

of section 922. See, e.g., King v. Story's, Inc., 54 F.3d 696, 697 (11th Cir. 1995); *K-Mart Enterprises of Florida, Inc. v. Keller*, 439 So. 2d 283, 286-87 (Fla. 3d Dist. Ct. App. 1983), *rev. denied*, 450 So. 2d 487 (Fla. 1984).

Lifter v. Varnado, 480 So. 2d 1336, 1338 (Fla. 3d Dist. Ct. App. 1985), *rev. dismissed*, 484 So. 2d 7 (Fla. 1986) is also illustrative. In that case, the tenants of a leased house brought a negligence action against their landlord for personal injuries sustained by a child living with them. The injuries stemmed from a collision between the child and his grandmother, who was carrying a pot of boiling water. The grandmother was carrying the water to the bathroom because, at the time of accident, the hot water heater at the house had been inoperable for three days. The trial court entered a judgment in favor of the plaintiffs. On appeal, the defendant argued, *inter alia*, that various local ordinances creating minimum housing standards could not be used to create a common law duty on the part of landlords to supply hot water. The Third District Court of Appeal rejected this argument:

> [W]e affirm the trial court's implicit finding that the minimum housing standards set forth in section 17-23, Metropolitan Dade County Code imposed a duty upon the landlord to provide hot running water in every basin, bathtub or shower. Although the question whether a plaintiff is within the class which the ordinance was intended to protect is a question of fact, it cannot be disputed here that plaintiffs, as tenants, were within the protected class.

Id. at 1338 (citing *DeJesus*).

Sections 918 and 951-55 of the United States Code plainly are different from the gun sale statute in *Decker* or the landlord regulation in *Lifter*. Among other things, these provisions (1) are not tailored to the narrow class of persons of which the Defendants are members; (2) are not focused on the discrete acts in which the Defendants engaged; and (3) were not devised to prevent harm to a foreign national in the position of the Plaintiff. Rather, these general statutes were drafted at a much higher order of abstraction. Papapanos' argument would be more plausible if the language and intent of the statutes on which he relies were similar to the narrow, targeted provisions at issue in *Decker* and *Lifter*. The mere fact that Congress (in the broadest sense) intended to eradicate the harmful effects of drug trafficking when it passed sections 918 and 951-55 does not provide support for the proposition that the Florida common law must or does supplement the criminal law by imposing a sweeping duty of care on a potentially limitless group of persons associated with the air cargo industry who might be in a position to obstruct drug trafficking offenses and thereby prevent harm to innocent third parties. Accordingly, we are not convinced that the federal statutes on which Papapanos bases his argument are sufficiently narrow to support a cause of action for negligence, at least under the unique facts and circumstances of this case. Notably, we can find no Florida case recognizing so sweeping a duty of care based on the national sovereign's proscription of narcotics.

In the alternative, Papapanos asserts that a common law duty arises from the particular conduct alleged in this case. Specifically, the Plaintiff maintains that the acts

of Manpower (storing the shipment and arranging the boxes on a pallet during a 2½ hour period) created a duty to detect or remove any illegal drugs from the shipment. In *McCain*, the Florida Supreme Court offered the following analysis:

> The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader "zone of risk" that poses a general threat of harm to others. . . . Florida, like other jurisdictions, recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others. As we have stated, "[w]here a defendant's conduct creates a *foreseeable zone of risk*, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses."

593 So. 2d at 503 (citations omitted) (emphasis added); *See, e.g., Pate v. Threlkel*, 661 So. 2d 278, 281 (Fla. 1995) (holding that a physician had duty to inform his patient that her condition might be transferrable to her children). The *McCain* court added the following gloss to its test:

> [A]s the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken. The statute books and case law, in other words, are not required to catalog and expressly proscribe every conceivable risk in order for it to give risk to a duty of care. Rather, each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result. This requirement of reasonable, general foresight is the core of the duty element.

593 So. 2d at 503. As this passage makes clear, Florida law does not recognize a "general duty one owes to all the world not to subject them to [harm]." *Braun*, 968 F.2d at 1114 (summarizing Georgia law). Rather, in order to define the scope of a defendant's duty, the Court must focus on the twin concepts of reasonableness and foreseeability.

In the case at bar, Papapanos asserts, again without detailed explication, that he "is within the 'foreseeable zone of risk' created by the activities of Manpower and the other defendants." P'tiff. Resp., at 16. At no point, however, does the Plaintiff attempt to identify the "zone of risk" implicated by Manpower's conduct. To the extent that zone of risk is a function of physical proximity, of course, Papapanos unquestionably falls outside that zone. Nevertheless, we read the Plaintiff's argument to suggest that a reasonable "zone of risk" in this context would encompass all those who came in direct or indirect contact with the sixth shipment after Manpower exercised control over it. We do not believe, however, that the limited tasks that Manpower undertook – arranging the shipment of flowers for further transportation and storing the cargo for a brief period of time – in and of themselves reasonably gave rise to a danger that an individual in another country would be injured as a result of the presence of drugs in the cargo. *Cf. McCain*, 593 So. 2d at 503. Put another way, we are not persuaded that a Florida court would, on the basis of Manpower's activities at Miami International Airport, extend the reasonable, foreseeable zone of risk arising from its conduct to encompass someone in the position of Papapanos.

We pause at this juncture to emphasize that our analysis of the Plaintiff's arguments for a duty of care must be guided by reference to Florida law and the decisions of the Supreme Court of Florida. *See Geary Distributing Co. v. All Brand Importers, Inc.*, 931 F.2d 1431, 1434 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 971 (1992); *Royal Health Care Services, Inc. v. Jefferson-Pilot Life Ins. Co.*, 924 F.2d 215, 216 (1991). Where the Supreme Court of Florida has not addressed a particular issue, we are bound by decisions of the Florida district courts of appeal that address the disputed question, unless there is an indication that the Supreme Court might not adhere to the district court's decision. *See Maseda v. Honda Motor Co.*, 861 F.2d 1248, 1257 n.14 (11th Cir. 1988). Papapanos has cited *no* case law from the Florida courts holding or even suggesting that the limited "zone of risk" concept recognized in *McCain* can be stretched to encompass the facts of this lawsuit.

It is significant that the Plaintiff does not base his negligence argument on Manpower's ownership of the carnations, or its careless supervision of the flowers while the shipment was under its watch.[5] Rather, Papapanos contends that Manpower and its co-Defendants had an obligation to inspect for contraband in each item of cargo arriving from Colombia and/or passing through Miami – over and above the inspections of customs officials. According to the Plaintiff, "Manpower's employees were engaged in the exportation and transshipment of cargo

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[5] Indeed, the complaint does not contain a single allegation concerning where or how the cocaine might have found its way into the carnations.

which had originated in a country known as a source of cocaine (Colombia) and was clearly so marked." P'tiff. Resp., at 15-16. Moreover, Papapanos explains, Manpower employees "were working in a metropolitan area known as a cocaine distribution center (Miami)." *Id.* at 16. In essence, therefore, the Plaintiff is asking this Court to find that Florida law imposes on all individuals or entities at Miami International Airport who are involved with the transport, storage or shipment of cargo originating in Colombia, an affirmative obligation owed to *all* persons (regardless of nationality or country of residence) to inspect bonded, sealed cargo for controlled substances and remove these substances before the cargo reaches its ultimate destination. Nothing in Florida law can be read to support so expansive an application of the concept of negligence, and the Plaintiff has cited no cases from this jurisdiction or elsewhere that impose such elaborate responsibilities on a defendant in the position of Manpower, which (like its co-Defendants) *never* represented or undertook to insure that the cargo it came in contact with would be free from hidden contraband upon arrival at the eventual destination.[6] We are not prepared to find, without meaningful precedent from the Florida courts, so sweeping a duty of care on the part of air cargo handlers

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[6] Several of the cases cited by the Plaintiff in support of his argument discuss foreseeable risk in the context of proximate cause rather than duty. *See Coker*, 642 So. 2d 774, 776-778; *Tieder v. Little*, 502 So.2d 923, 925 (Fla. 3d Dist. Ct. App. 1987), *rev. denied*, 511 So. 2d 298 (Fla. 1988). In *McCain*, the Florida Supreme Court confirmed that the foreseeability analysis for purposes of determining the existence of a duty is altogether different from the analysis for purposes of causation. 593 So. 2d at 503.

or carriers, particularly on this record and in this context, where the victim is a foreign national who was jailed by a foreign sovereign on foreign soil. For the foregoing reasons, Papapanos cannot establish one of the basic prerequisites to a cause of action for negligence. As a result, Manpower's motion to dismiss must be granted.[7]

C.

Dispatch Services ("Dispatch") has filed a motion for summary judgment against the Plaintiff. Dispatch is a Florida corporation that provides ground handling services to airlines at MIA. According to the complaint, Dispatch employees loaded the shipment later found to contain cocaine onto the Lufthansa aircraft, after it had been placed alongside the plane by employees of another Defendant (Cargolux). The Plaintiff insists that Dispatch, like its fellow Defendants, "owed to Papapanos a duty to use a high degree of care to prevent the [shipment] from arriving in Athens, Greece with illegal drugs, including cocaine." The Plaintiff maintains that Dispatch breached its duty of care by failing to detect or remove the cocaine. *See* Third Amended Complaint, at ¶¶ 30-31.

This Court referred Dispatch's motion to United States Magistrate Judge Stephen T. Brown for a report

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[7] The Plaintiff asserts that, under the doctrine of res ipsa loquitur, he is entitled to an inference that the cocaine was in the box of carnations when it was in Manpower's possession. P'tiff. Resp., at 2. *See Marrero v. Goldsmith*, 486 So. 2d 530, 531 (Fla. 1986). However, although res ipsa loquitur can be used to eliminate a plaintiff's need to produce direct evidence of a breach of duty, the doctrine presupposes the existence of a duty that the defendant is alleged to have breached.

and recommendation. After reviewing the parties' briefs, Magistrate Judge Brown issued his report on November 8, 1995, recommending that Dispatch's motion be granted. The Magistrate Judge reasoned that the Plaintiff could not establish a genuine issue of material fact as to whether Dispatch Services owed him a duty to detect and remove any illegal drugs in the shipment of carnations. Papapanos filed his objections to the report and recommendation on November 14, 1995.

As a starting point, we observe that the form of the Plaintiff's objections do not comply with the federal and local rules of procedure. Rule 4 of the Magistrate Judge Rules of this District states that written objections "shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made, the specific basis for such objections and supporting legal authority." This provision tracks the language of 28 U.S.C. §636(b)(1), which explains that the district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." The purpose of these guidelines is to ensure that the effect of the Magistrate Judge's report is to focus the district court's attention, and streamline the issues and arguments at the heart of the parties' dispute, thus improving judicial efficiency and avoiding unnecessary duplication of effort. *See Thomas v. Arn*, 474 U.S. 140, 147 (1985). Papapanos' objections make no reference to Magistrate Judge Brown's findings. Instead, it appears that the Plaintiff has taken his response to Manpower's motion to dismiss and presented it as his "objections" to the report and recommendation.

Exacerbating the problem is the fact that these objections present new arguments and case citations apparently never argued before the Magistrate Judge, despite the fact that most, if not all, of the case law that the Plaintiff now identifies existed at the time of his initial response to Dispatch's motion.[8] Although in reviewing a Report and Recommendation a district court "may receive further evidence," 28 U.S.C. §636(b)(1), courts in other jurisdictions have noted that the decision of a Magistrate Judge "should not be disturbed on the basis of arguments not presented to him." *See Mitchell v. Consolidated Freightways Corp.*, 747 F. Supp. 1446, 1447 (M.D. Fla. 1990); *see also Anna Ready Mix, Inc. v. N.E. Pierson Construction Co.*, 747 F. Supp. 1299, 1302-03 (S.D. Ill. 1990). These courts have observed that "[t]his rule is based

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[8] In his original response to the motion, for example, Papapanos never suggested that federal drug trafficking statutes might create a duty of care under the facts of this case. Papapanos' objections also ignore the Magistrate Judge's discussion of the "zone of foreseeable risk" principle as it applies to these facts. Instead, they simply revisit the question with additional case law.

On October 30, 1995, Papapanos filed a "Notice of the Applicability of the Arguments Advanced in his Memorandum of Law in Opposition to the Motion of Defendant [Manpower]" to the motions to dismiss and/or for summary judgment filed by Dispatch Services and the other Defendants in this case. Plaintiff's "Notice" was filed less than a week before Magistrate Judge Brown issued his report on the pending motions, and four to six months after Papapanos filed his initial responses to these motions. Defendant Florida West Gateway promptly filed a motion to strike the Notice, pointing out that the Plaintiff's submission had no basis in the local or federal Rules, was filed without leave of court and violated Local Rule 7.1. Papapanos never responded to this motion.

upon the same concept which prevents parties from arguing in the appellate courts issues and arguments not raised below." *Jesselson v. Outlet Assoc.*, 784 F. Supp. 1223, 1228 (E.D. Va. 1991). Indeed, the United States Court of Appeals for the Eleventh Circuit has noted that "[f]ailure to raise an issue, objection or theory of relief in the first instance to the trial court generally is fatal." *Denis v. Liberty Mutual Ins. Co.*, 791 F.2d 846, 848-49 (11th Cir. 1986). The teaching of these authorities is that this Court should be reluctant to address matters that were not presented nor considered by the Magistrate Judge. As the *Jesselson* court observed:

> [T]he purpose of the Magistrates Act is to allow magistrates to assume some of the burden imposed in the district courts and to relieve courts of unnecessary work. *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980); *Chamblee v. Schweiker*, 518 F. Supp. 519, 520 (N.D. Ga. 1981). Allowing [a party] to present their case to the Magistrate, and then, because they were unsuccessful, present new issues and arguments to this Court frustrates this purpose. The Magistrates Act was not intended to "give litigants an opportunity to run one version of their case past the magistrate, then another past the district court." *Greenhow v. Secretary of Health and Human Servs.*, 863 F.2d 633, 638 (9th Cir. 1988). Plaintiffs have not raised any claim of exceptional circumstances to justify or excuse their failure to make these arguments before the magistrate.

784 F. Supp. at 1228-29. Nevertheless, since the case law and issues raised in the Plaintiff's objections are before the Court upon Manpower's motion to dismiss, we are

reluctant to accept the Magistrate Judge's ultimate recommendation of dismissal for the sole reason that Papapanos has based his objection on arguments never raised before the Magistrate. Without objection, however, we will adopt Magistrate Judge Brown's report to the extent that it addresses the case law and arguments Plaintiff raised in his original response to Dispatch's motion. At all events, we agree with the Magistrate Judge's analysis of Florida law and his ultimate finding that the cases cited by the Plaintiff do not establish the common law duties that he seeks to impose in this lawsuit.

For the reasons outlined in reference to Manpower's motion to dismiss, the legal theories posited in Papapanos' objections are insufficient to establish a basis for his negligence action. Dispatch's involvement with the shipment of carnations at Miami International Airport was far too limited and remote to bring Papapanos, a Greek national, within the reasonable zone of risk attributable to its conduct. Accordingly, Dispatch Services' motion for summary judgment must be granted.

D.

Defendants Union Transport, Cold Transfer, Miami Express and Regal Air Freight have filed motions to dismiss, asserting that Papapanos has failed to establish the existence of a legally cognizable duty under the facts and circumstances of this case. According to the complaint, all of these Defendants had some brief contact with the shipment eventually found to contain cocaine. Union Transport personnel received the carnations on consignment from Colombian growers in Bogota, and

delivered the flowers to a cold storage facility at Bogota Airport to await air transport to Miami. Regal Air Freight unloaded the shipment when it arrived in Miami. Cold Transfer monitored the shipment for three hours after its unloading, in the midst of which the shipment was placed on a conveyor belt that ran beneath an x-ray machine. Cold Transfer employees then loaded the shipment onto a truck operated by Miami Express, which delivered the boxes to the Lufthansa cargo warehouse.

This Court referred all four of these motions to Magistrate Judge Brown for a report and recommendation. On November 8, 1995, the Magistrate Judge issued a single report, recommending that the motions be granted. Once again, Papapanos' objection does not refer to Magistrate Judge Brown's report, and constitutes a mirror image of his response to Manpower's motion to dismiss. For the reasons highlighted in our discussion of Dispatch Services' motion, we will adopt the Magistrate Judge's report on both procedural and substantive grounds. We do not believe that, in light of the limited participation of these Defendants in the transportation of the carnations from Bogota to Miami, a Florida court would conclude that the reasonable "zone of risk" extended to Papapanos, or that these cargo handlers were responsible for opening and inspecting the shipment in order to detect and remove hidden contraband. Thus, the motions to dismiss filed on behalf of Union Transport, Cold Transfer, Miami Express and Regal Air Freight must be granted.

E.

Defendant Cargolux has moved for summary judgment. According to the complaint, Cargolux came in contact with the shipment eventually found to contain cocaine when it transported the boxes from the Lufthansa warehouse, where it had been under the aegis of Manpower employees, to the Lufthansa airplane, where it was then loaded by employees of Dispatch Services. This Court referred Cargolux's motion to Magistrate Judge Brown. In a report issued November 8, 1995, the Magistrate Judge recommended that the motion be granted, after finding that no genuine issue of material fact remained as to whether Cargolux owed Papapanos a duty to detect and remove illegal drugs from the shipment. Once again, the Plaintiff's objection is a reiteration of his response to Manpower's motion to dismiss. For reasons already discussed, the Magistrate Judge's Report and Recommendation is adopted as to Cargolux on procedural and substantive grounds. We can find no basis under Florida law to hold that Cargolux's limited participation in the transportation of the flowers from Bogota to Athens was sufficient to bring Papapanos within the reasonable zone of danger attributable to Cargolux's conduct.

F.

Florida West has moved for summary judgment against Papapanos, based in part on the Plaintiff's inability to establish that Florida West owed him a duty to open and inspect the shipment for illegal drugs and remove them before their arrival in Athens. Lufthansa

also has moved for summary judgment on the same grounds. The complaint alleges that Florida West flew the shipment of carnations from Bogota to Miami, while Lufthansa flew the shipment from Miami to Athens via Frankfurt.[9]

The Plaintiff's arguments as to these air carrier Defendants are identical to those he makes with regard to the cargo handler Defendants. In essence, Papapanos argues that Florida West and Lufthansa had a common law obligation rooted in Florida law to insure that packages from Colombia or Miami would not be used to transport hidden contraband. We do not agree. According to Papapanos, however, Florida West and Lufthansa, as air cargo carriers, are in a somewhat different position than the other Defendants. Papapanos suggests that these carriers were on notice of international smuggling incidents aboard their flights, and had adopted internal procedures and agreements with customs officials in an effort to combat this problem. The Plaintiff does not suggest that Lufthansa or Florida West breached these internal procedures or violated the customs agreements (let alone that the Defendants breached specific provisions in these agreements or regulations that required them to open and/or inspect sealed cargo in order to

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[9] The Court referred both of these motions to Magistrate Judge Brown for a report and recommendation. The Magistrate Judge recommended that both motions be denied without prejudice, pending a ruling on the Plaintiff's motion for leave to file a fourth amended complaint. None of the parties filed objections to this recommendation. Nevertheless, we will take up the merits of the Defendants' motions.

ferret out contraband).[10] Rather, Papapanos suggests that the prior smuggling incidents – coupled with the various agreements and internal rules – underscore these Defendants' awareness of a drug trafficking problem on their flights. This awareness, according to Papapanos, was sufficient to trigger certain duties to innocent third parties.[11]

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[10] For this reason, the logic of *Couzado v. United States*, 883 F. Supp. 691 (S.D. Fla. 1995) is inapposite. In *Couzado*, another court in this District upheld a jury verdict of negligence against the United States, based on a finding that government agents failed to comply with certain administrative and Executive guidelines specifically regulating the conduct of controlled narcotics delivery flights passing through foreign countries. In the case at bar, Papapanos never argues, and presents no evidence to suggest that Lufthansa or Florida West breached specific rules or regulations that unequivocally required them to undertake the inspections that he would have them perform in order to ferret out cocaine.

[11] We note that the Plaintiff has moved to defer ruling on the motions of Florida West and Lufthansa, in order to allow him additional time to take depositions and attempt to lay a documentary foundation for his argument that these Defendants were aware of a smuggling problem on flights to and/or from Miami and/or Columbia. *See* P'tiff. Mot. for Continuance of Hearing on Lufthansa Mot. for Summary J'ment, November 8, 1995 (seeking postponement because certain materials "*may* cast light upon the existence and scope of Lufthansa's duty of care) (emphasis added). Papapanos cannot suggest, however, that he has been denied a meaningful opportunity to conduct discovery. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (noting that Fed. R. Civ. P. 56(c) contemplates the entry of summary judgment "after an adequate time for discovery"). The majority of the discovery that Papapanos seeks to take is new, even though the formal discovery period closed on October 31, 1995 and none of the parties have moved for an extension. Papapanos cites no case law indicating that Rule 56(f) requires a court to postpone

We are unconvinced. The fact that Florida West and Lufthansa were aware of drug smuggling on air cargo flights originating in Colombia and/or passing through Miami – or were familiar with the efforts of customs officials worldwide to combat the importation of contraband in shipments of flowers – does not mean that these air carriers were required to duplicate the efforts of customs agents and detect the presence of illegal drugs hidden in bonded, sealed cargo in order to prevent harm to someone in the position of the Plaintiff (a Greek citizen whose only connection to the tainted cargo was in his capacity as managing director of the cargo's intended recipient). Nothing in the law of Florida supports the imposition of so expansive a duty of care, which would substantially increase costs in the air cargo business and create additional delays in an industry that thrives on its ability to ensure the prompt delivery of perishable items like flowers. This is not a case where, for example, an air carrier, although put on notice that a specific package on a specific flight contained drugs, nevertheless failed to take precautions to prevent the cargo from arriving at its ultimate destination with the narcotics still in place. Indeed, Papapanos never suggests that Lufthansa or Florida West had any knowledge that cocaine might have

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resolution of a summary judgment motion until the Plaintiff has obtained all evidence conceivably bearing on his claim, even if that evidence is sought after the close of discovery and after the motions have been pending for months. At all events, the existence of a duty is a question of law, and mere awareness of a smuggling problem does not, under Florida law, establish that air cargo carriers in the position of Florida West or Lufthansa are required to ferret out drugs in order to prevent harm to individuals in the position of Papapanos.

been hidden in one of the shipments of carnations en route to Florimex Athens. To summarize, therefore, evidence that Lufthansa or Florida West anticipated the possibility of smuggling on their cargo flights does not, under these facts and circumstances, support the obligations that Papapanos seeks to impose in the instant case.

G.

Lufthansa has moved for summary judgment on Count II of the Plaintiff's third amended complaint, which seeks relief for intentional infliction of emotional distress. Lufthansa raises several arguments for summary judgment, among them that the conduct alleged does not rise to the level of outrageousness required under Florida law.[12] We agree that, as a matter of law, Lufthansa's conduct is not so shocking or offensive that Papapanos is entitled to proceed with his claim.

In his third amended complaint, Papapanos makes the following allegations:

> 37. Following Papapanos' arrest and confinement to the Korydallos prison, his criminal

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[12] Lufthansa asserts that its unwillingness to provide the letter did not cause Papapanos to suffer the alleged distress; rather, the Plaintiff's distress was the product of his imprisonment by Greek authorities, who may or may not have released him upon receipt of the letter. Moreover, according to Lufthansa, the Plaintiff cannot prove that Lufthansa "intended" to cause the Plaintiff's distress when it refused to turn over the letter (due to the undisputed fact that Lufthansa was never apprised of the importance of the letter to Papapanos). Because we find that, under Florida law, Lufthansa's conduct was not outrageous, we do not reach these additional arguments.

defense lawyers decided to apply for his release on bail pending his trial. Papapanos' criminal defense lawyers determined that such a bail application would not succeed unless it was supported by a letter from Lufthansa confirming that it was battling the international smuggling of illegal drugs in cargo shipments by parties unrelated to shippers, freight forwarders and consignees. Accordingly, Papapanos' criminal defense lawyers asked Florimex to intercede with Lufthansa for the provision of such a letter. Florimex, which was underwriting the cost of Papapanos' defense to the drug trafficking charge against him, repeatedly asked Lufthansa to provide Papapanos' criminal defense lawyers with such a letter to support Papapanos' bail application. Lufthansa initially indicated to Florimex that it would provide such a letter to Papapanos' criminal defense lawyers. However, Lufthansa failed to provide Papapanos' criminal defense lawyers with such a letter and, after an agonizing delay, advised Florimex that it would not provide such a letter to Papapanos' criminal defense lawyers for fear of impairing its reputation with the government of the Greek republic. Papapanos' two (2) bail applications to the Greek courts, unsupported by the Lufthansa letter, were denied.

38. Lufthansa's refusal to provide the requested letter to Papapanos' criminal defense lawyers was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.

Third Amended Complaint, at ¶¶ 37-38.

The evidence establishes that Eberhardt Lehner, an executive with Florimex Athens' parent corporation, asked Lufthansa to send to the Greek authorities a letter describing Lufthansa's awareness of the problem of drug smuggling through international air cargo flights. Lufthansa did not provide the letter. Lehner acknowledged, however, that no Lufthansa representative ever agreed to send a letter of this sort.

In *Metropolitan Life Insurance Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985), the Florida Supreme Court recognized the tort of intentional infliction of emotional distress, and adopted the standard embodied in Section 46, Restatement (Second) of Torts as the appropriate benchmark for the cause of action. *Id.* at 278-79. The comment to section 46 adds the following familiar gloss to this definition:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Metropolitan Life, 467 So. 2d at 278-79 (quoting Restatement (Second) of Torts § 46 cmt. d (1965)). The question of what constitutes outrageous conduct is judged by an objective test. *Id.* Moreover, the issue is ordinarily one of law to be resolved by the court, rather than a question of fact to be resolved by a jury. *Dependable Life Ins. Co. v. Harris*, 510 So. 2d 985, 988 (Fla. 5th Dist. Ct. App. 1987).

We conclude that, under Florida law, Lufthansa's failure to provide the letter does not come close to representing the kind of extreme and outrageous conduct needed to state a claim for intentional infliction of emotional distress. *See, e.g., Metropolitan Life*, 467 So. 2d at 279 (citing Restatement (Second) of Torts § 46 for the proposition that "plaintiffs must necessarily be expected and required to be hardened to . . . occasional acts that are definitely inconsiderate and unkind"); *Lay v. Roux Laboratories, Inc.*, 379 So. 2d 451, 452 (Fla. 1st Dist. Ct. App. 1980) (finding that the Defendant's misconduct did not rise to the level of atrociousness required for relief even though it was "extremely reprehensible"). Papapanos does not cite a single opinion where a Florida court has allowed relief for this tort on facts similar to those in the case at bar. Indeed, the lone case that Papapanos does cite – *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 1110 (1995) – underscores the restrictiveness with which Florida courts have interpreted the tort. In *Vance*, the Eleventh Circuit actually upheld the district court's rejection of the plaintiff's claim, despite cataloguing a list of racially motivated conduct that included verbal torment, acts of sabotage, attempts to induce a nervous breakdown and "hanging a rope noose over [plaintiff's] work station." *Id.* at 1574 n.2.

For the most part, Florida courts have limited relief to situations where a special relationship exists between the tortfeasor and a vulnerable plaintiff. In *McAlpin v. Sokolay*, 596 So. 2d 1266, 1268-69 (Fla. 5th Dist. Ct. App. 1992), for example, the Fifth District allowed a claim for emotional distress by a hospital patient who had been verbally assaulted and threatened by a physician about a

debt she owed to the physician's friend. In *Dominguez v. Equitable Life Assurance Society*, 438 So. 2d 58, 61-62 (Fla. 3d Dist. Ct. App. 1983), *approved*, 467 So. 2d 281 (Fla. 1985), the Third District Court of Appeal permitted a cause of action for emotional distress where an insurer falsely accused an injured insured of fabricating his claim. And in *Smith v. Telophase Nat'l Cremation Society, Inc.*, 471 So. 2d 163, 166 (Fla. 2nd Dist. Ct. App. 1985), the Second District Court of Appeal allowed a widow's cause of action after the defendant failed to dispose of her late husband's ashes in accordance with certain specific instructions. In this case, there was no special relationship whatsoever between Papapanos and Lufthansa, except in the narrow sense that the Plaintiff was a manager of a corporation that was to receive cargo arriving in Athens aboard a Lufthansa flight.

Papapanos argues that Lufthansa was obligated to provide the letter on the basis of representations it made in an earlier letter dated April 28, 1992. In that letter, Peter Ullmayer, Lufthansa's Area Cargo Manager for Florida and the Bahamas, wrote to Florimex Athens concerning the events leading up to Papapanos' arrest, and concluded "[w]e offer any cooperation you might need in this case." Third Amend. Compl., Exh. A. The Plaintiff insists that this sentence "constituted Lufthansa's voluntary, binding assumption of an enforceable duty to help secure Papapanos' release from confinement and exoneration from the drug trafficking charges which had been leveled against him." P'tiff. Resp. at 14. We do not agree that this sentence can be read as an unambiguous, quasi-contractual promise on the part of Lufthansa to provide the disputed letter, and no evidence has been introduced

to suggest that the parties interpreted it as such. The full text of the letter places it in proper context:

> Dear Sirs:
>
> On April 21, 1992, we were informed that drugs were found in a Florimex shipment from Bogota via Miami to Athens. Unfortunately, as the shipment was only in Miami handed over to Lufthansa, we were not in total control of the shipment.
>
> As soon as we were informed, both Lufthansa and the local forwarder, Union-Transport, contacted the Miami Drug Authorities to offer the utmost cooperation in this case.
>
> Knowing the Colombia and Miami are international drug centers, Lufthansa's security standards are very high.
>
> As we have dealt with Florimex for many years, they are one of our main clients, and we can assure the reliability of this customer. There have never been any comparable cases.
>
> We do hope, and we are sure, that the case can be cleared soon, showing that there is no link either to Florimex, Lufthansa, or the involved forwarder.
>
> We offer any cooperation you might need in this case.

Id. Even if we assumed that the April 28th communication or other conduct created some form of contractual obligation to Florimex Athens, Papapanos offers no case law to support the proposition that a breach of contract

must, of its own accord, support a tort action for intentional infliction of emotional distress.

The Plaintiff further contends that Lufthansa did not send the letter declaring its awareness of drug smuggling problems on air cargo flights because Papapanos was a Greek, rather than German, national. Lufthansa, however, points out that it did not send the letter because it did not want to jeopardize its relationship with the Greek Government, or improperly inject itself in the criminal proceedings against Papapanos. Whatever Lufthansa's reasons for refusing to send the letter, and regardless of whether those reasons were justifiable or in bad faith, no reasonable trier of fact could find that Lufthansa's conduct, at least on this record and under these circumstances, rose to the level of outrageousness needed under Florida law. For this reason, Lufthansa is entitled to summary judgment on Count II of the Plaintiff's complaint.

III.

The Plaintiff has sought leave to file a fourth amended complaint. Papapanos filed his initial complaint in the Fall of 1994, and filed his first amended complaint on January 18, 1995. At the status conference on September 21, 1995, the Court granted the Plaintiff's motion for leave to file his third amended complaint.[13] Defendant Florida West has filed a memorandum in opposition to the Plaintiff's motion.

---

[13] The Plaintiff had sought leave to file a second amended complaint, but withdrew that request when it sought leave to file the third amended complaint.

According to Papapanos, the proposed fourth amended complaint "(a) incorporates the substance of the deposition testimony given by Messrs. Pappas and Cronnelly in this action; and (b) clarifies the juridical basis for and the natures of the Defendants' duties of care owing to Papapanos." P'tiff. Mot. for Leave, at 2. To be specific, the proposed amended complaint alleges that both Lufthansa and Florida West entered "Airline Initiative Agreements" with the United States Customs Service that required them to "implement stringent procedures for the detection of narcotics, including cocaine, hidden aboard its aircraft departing from Bogota, Colombia and arriving in the United States." Proposed Fourth Amend. Complt. at 2-3. The proposed amended complaint also adds the following new language to Count I, which alleges a cause of action for negligence:

> The Defendants were familiar with the efforts of the United States Customs Service to combat the importation, transshipment and exportation through MIA, of illegal drugs, including cocaine, hidden in shipments of flowers originating in Colombia. Under 21 U.S.C. 881 and 951-955, the Defendants owed duties to Papapanos to . . . warn Papapanos that the sixth shipment could contain illegal drugs, including cocaine, hidden in one or more of its constituent boxes.

Id. at 30.

In essence, therefore, the proposed amended complaint adds a new theory based on the Defendants' "failure to warn," and highlights certain Airline Initiative Agreements as a possible source for the duties that Papapanos seeks to impose on Lufthansa and Florida West.

The Plaintiff cites no case law in support of his request for leave to amend. He does state that permitting the amendment will serve the "interests of justice," and "would not prejudice the substantial rights of any of the Defendants." P'tiff. Mot for Leave, at 2-3. Papapanos does not elaborate on how the interests of justice are served by this amendment, though. More to the point, the prejudice to the Defendants is plain.

In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court established the standards for leave to amend under Rule 15(a) of the Federal Rules of Civil Procedure. The Court explained that:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason . . . such as undue delay, bad faith or dilatory motive . . . repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment . . . the leave sought should, as the rules require, be "freely given."

Id. at 182. Thus, in setting down the rule that leave to amend is to be granted liberally, the Supreme Court also made clear that there are exceptions to that rule. Moreover, while Fed. R. Civ. P. 15(a) guides our judgment, the matter is within the district court's discretion. *Smith v. Duff & Phelps, Inc.*, 5 F.3d 488, 493 (11th Cir. 1993); *Hester v. International Union of Operating Engineers, AFL-CIO*, 941 F.2d 1574, 1578 (11th Cir. 1991).

There are multiple reasons to reject the Plaintiff's request for leave to file yet another amended complaint. First, this is at least the fourth occasion on which Papapanos has sought to amend his complaint, which he initially filed over eighteen months ago. The Plaintiff offers no reason why his allegation of a "duty to warn" could not have been raised in the third amended complaint, which the Court permitted just five weeks before Papapanos filed the instant motion. Second, allowing the proposed amended complaint will have an adverse effect on the prompt resolution of these proceedings. If the amendment is allowed, all of the pending motions to dismiss and for summary judgment (some of which are the subject of Reports and Recommendations, and all but one of which was filed several months before the submission of this motion) will have to be re-briefed in order to address the Plaintiff's new allegations. In addition, it is likely that formal discovery, which closed in October of 1995, will have to be re-opened in order to flesh out the new allegations. The Supreme Court and the Eleventh Circuit have recognized that a proposed amendment may be denied where it will result in undue delay. *See Foman*, 371 U.S. at 182; *Nolin v. Douglas County*, 903 F.2d 1546, 1550-51 (11th Cir. 1990) (affirming denial of motion for leave to amend where the proposed amendment would have required a postponement of trial), *overruled on other grounds by McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994); *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1025 (5th Cir. 1980) (affirming denial of motion for leave to amend where the proposed amendment was filed after the close of discovery and the movant offered no explanation for the delay). Moreover, the Eleventh Circuit often has

affirmed the denial of motions to amend where the proposed amendment is offered in reaction to or to stave off an adverse ruling. *See, e.g., Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 622-23 (11th Cir. 1983) (affirming denial of leave to amend which was sought after summary judgment had been entered against the moving party); *Local 472, et al. v. Georgia Power Co.*, 684 F.2d 721, 724 (11th Cir. 1982) (affirming denial of leave to amend "which appears to be nothing more than an effort to avoid an adverse summary judgment"). In one sense, Papapanos' motion for leave is nothing more than an attempt to postpone a final ruling on the various case-dispositive motions, and escape the Magistrate Judge's finding that the Defendants simply did not owe a legally cognizable duty to the Plaintiff.

Finally, the Plaintiff's proposed amended complaint appears to be insufficient to cure the defects in the third amended complaint. *See Foman*, 371 U.S. at 182; *Halliburton & Assoc., Inc. v. Henderson, Few & Co.*, 774 F.2d 441, 444 (11th Cir. 1985) (indicating that leave to amend need not be granted where the amended pleading is still subject to dismissal). In his new complaint, Papapanos alleges that federal drug trafficking statutes required the Defendants to warn him that third parties might succeed in planting illegal drugs in the shipments of carnations, and that these drugs might remain undetected until their arrival in Athens. As discussed above, however, the federal statutes on which Plaintiff relies do not, under the facts and circumstances of this case, establish that the Defendants owed Papapanos the extraordinary duty of care that he seeks to impose. *Cf. Palmer*, 622 So. 2d at 1088 (noting that "[u]nder the common law, a person has no duty to control

the tortious or criminal conduct of another or to warn those placed in danger by such conduct unless there is a special relationship between the defendant and . . . the person who is a foreseeable victim of such conduct"). Federal statutes regulating the import and export of controlled substances and narcotics are not the kind of narrow, targeted laws that – in some situations – have supported negligence claims under Florida law. Moreover, the Plaintiff's apparent (but unstated) suggestion that the airline initiative agreements implicitly required Florida West and Lufthansa to search items of cargo in order to ferret out contraband and prevent harm to a foreign national like Papapanos is too attenuated to support relief under existing Florida law. Papapanos has cited no case law from this or any other jurisdiction suggesting that a broadly worded agreement that commits an air carrier to cooperate with Customs and law enforcement officials in order to combat the secret trafficking of illegal narcotics can support a private civil cause of action for negligence. At all events, Papapanos' motion for leave to file a fourth amended complaint should now be denied.

For all of the foregoing reasons, it is therefore ORDERED AND ADJUDGED:

(1) Defendant Dispatch Services' Motion for Summary Judgment is GRANTED. The Magistrate Judge's Report and Recommendation is ADOPTED, and judgment shall be entered in favor of Dispatch Services;

(2) Defendant Union Transport's Motion to Dismiss is GRANTED. The Magistrate Judge's Report and Recommendation is ADOPTED, and the Plaintiff's complaint is dismissed as to Union Transport;

(3) Defendant Cold Transfer's Motion to Dismiss is GRANTED. The Magistrate Judge's Report and Recommendation is ADOPTED, and the Plaintiff's complaint is dismissed as to Cold Transfer;

(4) Defendant Miami Express's Motion to Dismiss Amended Complaint is GRANTED. The Magistrate Judge's Report and Recommendation is ADOPTED, and the Plaintiff's complaint is dismissed as to Miami Express;

(5) Defendant Regal Air Freight's Motion to Dismiss Amended Complaint is GRANTED. The Magistrate Judge's Report and Recommendation is ADOPTED, and the Plaintiff's complaint is dismissed as to Regal Air Freight;

(6) Defendants Lufthansa and Cargolux's Cross-Motion for Partial Summary Judgment on Plaintiff's Claims for Negligence is GRANTED;

(7) Defendant Florida West Gateway's Motion for Summary Judgment is GRANTED;

(8) Defendant Manpower's Motion to Dismiss is GRANTED;

(9) Plaintiff's Motion for Leave to File Fourth Amended Complaint is DENIED;

(10) Defendant Lufthansa's Motion for Partial Summary Judgment Dismissing Plaintiff's Claim for Intentional Infliction of Emotional Distress is GRANTED;

It is further ORDERED AND ADJUDGED that all other outstanding motions are DENIED AS MOOT. Defendants Dispatch Services, Lufthansa, Cargolux and Florida West shall file proposed orders of final summary judgment within ten (10) days of the date of this Order. This case is closed.

DONE AND ORDERED in Miami, this 15 day of April, 1996.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES
DISTRICT JUDGE

copies to:
Magistrate Judge Brown
Counsel of record

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-4755
Non-Argument Calendar

D. C. Docket No. 94-2667-CIV-MARCUS

PAUL PAPAPANOS,

Plaintiff-Appellant,

versus

LUFTHANSA GERMAN AIRLINES, a Foreign Corporation; GIRAG CORPORATION, a Florida Corporation; COLD TRANSFER, INC., a Florida Corporation; UNION TRANSPORT CORP., a Foreign Corporation; CARGOLUX AIRLINES INTERNATIONAL, INC., a Foreign Corporation; DISPATCH SERVICES, INC., a Florida Corporation; FLORIDA WEST GATEWAY, INC., a Delaware Corporation, et al.,

Defendants-Appellees,

PANALPINA, INC., a Florida Corporation,

Defendant.

Appeal from the United States District Court
for the Southern District of Florida

(August 29, 1997)

Before HATCHETT, Chief Judge, TJOFLAT and EDMONDSON, Circuit Judges.

PER CURIAM:

We affirm the district court's decision rejecting appellant's claims on the merits. We adopt as our own the reasoning of its dispositive order of April 15, 1996, granting appellees' motions to dismiss and/or summary judgment and denying appellant leave to file a fourth amended complaint.

We reject for the reasons stated in Point I of Lufthansa's brief appellant's argument that the district court lacked subject matter jurisdiction because Lufthansa was not entitled to remove the case to federal court under 28 U.S.C. § 1441(d).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-4755

PAUL PAPAPANOS,

Plaintiff-Appellant,

versus

LUFTHANSA GERMAN AIRLINES, a Foreign Corporation; GIRAG CORPORATION, a Florida Corporation; COLD TRANSFER, INC., a Florida Corporation; UNION TRANSPORT CORP., a Foreign Corporation; CARGOLUX AIRLINES INTERNATIONAL, INC., a Foreign Corporation; DISPATCH SERVICES, INC., a Florida Corporation; FLORIDA WEST GATEWAY, INC., a Delaware Corporation, et al.,

Defendants-Appellees,

PANALPINA, INC., a Florida Corporation,

Defendant.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Oct. 31, 1997)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, _____F.2d_____).

Before: HATCHETT, Chief Judge, TJOFLAT and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
DEC 24 1997
CLERK

(2)

No. 97-862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PAUL PAPAPANOS,

Petitioner,

vs.

LUFTHANSA GERMAN AIRLINES, etc., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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11 pp

CORPORATE AFFILIATIONS

1. Deutsche Lufthansa A.G. doing business as Lufthansa German Airlines has no corporate parents, subsidiaries, or affiliates the shares of which are publicly traded in the United States.

2. Cargolux Airlines International, S.A. has no corporate parents, subsidiaries, or affiliates the shares of which are publicly traded in the United States.

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BRIEF IN OPPOSITION TO PETITION

Respondents, Lufthansa German Airlines ("Lufthansa") and Cargolux Airlines International ("Cargolux"), respectfully submit this brief in opposition to the petition for a writ of certiorari.

POINT I

THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Petitioner asserts that the decision below conflicts with decisions of two other United States courts of appeals concerning the appropriate point or points in time to assess a party's status as to whether or not that party is an "agency or instrumentality of a foreign state," for purposes of removal jurisdiction, pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1441(d). Petitioner cites two groups of cases. The first has granted "foreign state" status where a defendant was a foreign state at the time the act complained of occurred ("Period A") but not at the time the complaint was filed ("Period B")--*General Elec. Corp. v. Grossman*, 991 F.2d 1376, 1380-82 (8th Cir.

1993); *Gould, Inc. v. The Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988), *cert. dismissed sub nom., Pechiney & Trefimetaux v. Gould, Inc.*, 503 U.S. 978 (1992). The second group has granted foreign state status to a party that was a foreign state at or after the time the complaint was filed, Period B, but not at the time that the act complained of occurred, Period A--*Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458, 1460 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985); *Callejo v. Bancomer, S.A., 764 F.2d 1101, 1106-1107 (5th Cir. 1985); Straub v. A P Green Inc.*, 38 F.3d 448, 451 (9th Cir. 1994).

There is no conflict between these groups of cases because no court which has granted foreign state status based on a party's status during Period A has ever stated that it would be inappropriate to grant foreign state status to a party based on its status during Period B. And conversely, no court granting foreign state status to a party that was a foreign state during Period B has ever stated that it would be inappropriate to grant foreign state status to a party based on its status during Period A.

As noted in *Cargill International, S.A. v. M-T Pavel Dybenko*, 991 F.2d 1012

1016 (2nd Cir. 1993):

> [T]he FSIA was enacted to address "the potential sensitivity of actions against foreign states." H.R.Rep. No. 1487, 94th Cong., 2d Sess. 32 (1996), *reprinted in 1996 U.S.C.C.A.N. 6604, 6631* ("House Report"). Thus, it aimed "to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." *Id.* at 45, *reprinted in 1996 U.S.C.C.A.N. at 6634* (executive communication from Departments of State and Justice enclosing draft bill for consideration of the House).

As stated by this Court:

> The Act...clearly contemplates that such suits may be brought in either federal or state courts. However, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area," H.R.Rep No. 94-1487, at 32, the Act guarantees foreign

> states the right to remove any civil action from a state court to a federal court, *id.* § 1441(d).

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489 (1983).

Following the FSIA's policy of addressing the "potential sensitivity of actions against foreign states and the importance of developing a uniform body of law" explicitedly focused on removal, *id.*, the courts of appeals have applied foreign state status to parties that were foreign states at Period A, at Period B, or at both Periods A and B. While holding that the FSIA applies when foreign state status occurred at Period B, the Ninth Circuit emphasized the fact that both Periods were appropriate when it stated that the "reliance [of the party opposing foreign state status] on cases from other circuits [applying Period A] does not support his argument [that Period B is not appropriate]." *Straub* at 451. The court continued, "*Straub* has cited no precedent holding that a party that is a foreign state when the litigation commences [Period B] is not entitled to the protections of the FSIA. We have found none." *Id.* Nor have Petitioner or Respondents in the case at bar found any precedent holding that a party, that is a foreign state when the act

complained of occurred, Period A, is not entitled to the protections of the FSIA.

There is no conflict because the precedents all give effect to the public policy of the FSIA which is to give uniform treatment to foreign sovereigns who are involved in a lawsuit at either relevant time. This uniform treatment consists of having the case heard by a federal judge, who is part of one federal system, without a jury.

In sum, the courts have recognized that the policy of the FSIA, to address the potential sensitivity of actions against foreign states by developing a uniform body of federal law which guarantees a foreign state, among other things, the right to remove any civil action to a federal court, is best given effect by applying either Period.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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